

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1488

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

-against-

JAMES ARTHUR LEPORE and
GUISEPPE DeVIVO,

Defendants-Appellants.

Docket No. 77-1488

B
p/s

REPLY BRIEF FOR APPELLANT
JAMES ARTHUR LEPORE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
JAMES ARTHUR LEPORE
FEDERAL DEFENDER SERVICES UNIT
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,

Of Counsel.

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ARGUMENT

I

The Government contends that appellant's claim that the Government was required to elect which of two duplicative counts to submit to the jury was waived by the failure to raise the issue prior to trial (Gov't.Br. at 12) and that any error was cured by the failure to impose multiple sentences (Gov't.Br. at 14). The Supreme Court's opinion in United States

v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225 (1952) and this Court's decision in United States v. Ketchum, 320 F.2d 3, 8 (2d Cir.), cert. denied, 375 U.S. 905 (1963) clearly demonstrate that the Government's position is incorrect. Indeed, not only was the issue not waived, but it might have been error to move for dismissal of either count prior to the conclusion of the Government's case:

Whether an aggregate of acts constitute a single course of conduct and therefore a single offense, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts.

United States v. C.I.T.
Credit Corp., supra,
344 U.S. at 225.

Here, defense counsel had to await the Government's proof. As this Court has noted, under these circumstances dismissal, prior to trial, would be inappropriate:

[E]ven if it were far clearer than it now is that the Government's evidence would necessarily be limited as the judge thought, and if we should agree with his construction of the statute as permitting only one punishment in that event, dismissal ... was still unwarranted.

United States v. Ketchum,
supra, 320 F.2d at 8
(Gov't. appeal from dismissal of seven counts of an indictment.)

Rather, the correct remedy is to require the Government to elect after its proof at trial. United States v. Ketchum, supra, 320 F.2d at 8, quoting United States v. Universal C.I.T. Credit Corp., supra, 344 U.S. at 225. ("In any event, by an indictment

of multiple counts the prosecutor gives the necessary notice and does not do the less so because at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense.") (Emphasis added.)

As to the Government's argument that the error was cured by the lack of cumulative sentences, this Court has explained:

... The basis for requiring even an election among counts is not at all that the defendant may otherwise face multiple sentences. Decision as to the unit of punishment is not controlled by the form of the indictment; as Judge Wyzanski has said, "multiplicitousness never places a defendant in jeopardy of multiple sentences." United States v. Mamber, 127 F.Supp. 925, 927 (D.Mass. 1955). The reasons for requiring the Government to elect among counts in some cases are, rather, primarily those of promoting the order and efficiency of the trial and avoiding the risk that "the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes."

United States v. Ketchum,
supra, 320 F.2d at 8.

II

The Government contends that the error of multiplicity did not occur here, relying on the proposition that "Section 472 proscribes possession of counterfeit currency while Section 473 proscribes the sale, but not the possession of the counterfeit currency" (Gov't.Br. at 13). While this principle may be correct as an abstract matter (see, e.g., United States v. DiPalermo, 340 F.2d 988, 989 (2d Cir. 1965); United States v.

Mercurio, 254 F.2d 925 (7th Cir. 1958); United States v. Farina, 193 F.2d 436, 438 (2d Cir. 1951); United States v. Cioffi, 487 F.2d 492, 496 n.3 (2d Cir. 1973)*), it has no relevance to the specific issue raised on appeal.

The Government's brief, which does not refer to the language of the indictment or the judge's instructions, would lead this Court to believe that Count Two, based on 18 U.S.C. §472, related solely to possession of counterfeit notes with Count Three charging the notes' sale. To the contrary, Count Two was not limited in that fashion, but charged that appellant and the co-defendant "did sell and attempt to sell and did keep in their possession and conceal ... " counterfeit notes. In accordance with this language, the district judge told the jury that a finding as to any alternative theory of guilt alleged would be sufficient to convict (Trial transcript at 740)**. Indeed, as explained in appellant's main brief, the district court's instructions on Counts Two and Three were virtually identical (App.Br. at 15-17).

Even if Count Two had been confined to a possession charge, under the Government's theory and its proof at trial, any possession by appellant was, in fact, incidental to the March 9th

*These cases, upon which the Government relies, do not deal with the requirements of election, but rather with multiple sentencing and double jeopardy.

**The judge instructed the jurors in a similar fashion with respect to Count Three (Trial transcript at 746).

sale. Under those circumstances possession was not a separate offense. United States v. Chiarella, 187 F.2d 12-13 (2d Cir. 1951) ("So far therefore as any possession is a necessary incident to any of the other offenses [i.e., violations of 18 U.S.C. §473], it cannot have been intended as a separate offense.")

CONCLUSION

For the foregoing reasons and the reasons in appellant's main brief, the judgment of the district court must be reversed and a new trial ordered.

Respectfully submitted,

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
JAMES ARTHUR LEPORE
FEDERAL DEFENDER SERVICES UNIT
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,

Of Counsel.

CERTIFICATE OF SERVICE

May 5, 1978

I certify that a copy of this reply brief has been
mailed to the United States Attorney for the Southern
District of New York.

Jonathan Silbermann